Supreme Court, U.S.
FILED

95 1544 JAN 22 1996

In the Supreme Court of the United States

October Term, 1995

No. 95-_____

ANTHONY J. BURKHART,
CARMELLA L. BURKHART, H/W,

Petitioners,

VS.

LOUIS P. AGOSTINI, JR., ESQUIRE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Anthony J. Burkhart
Carmella L. Burkhart
7 Cavallero Court
New Castle, DE 19720
(302) 324-9771

44 pp

QUESTION PRESENTED FOR REVIEW

Whether the Delaware Superior Court's denial of Petitioners' motion for relief from judgment arbitrarily infringed upon Petitioners' right to substantive due process under the Fourteenth Amendment of the United States Constitution when Petitioners had satisfied the requirements for obtaining this relief?

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STATEMENT OF JURISDICTION

Petitioners seek relief from the October 10, 1995 final order of the Delaware Supreme Court [1a][1] affirming the Delaware Superior Court's order dated December 22, 1994, which denied Petitioners' motion for relief from judgment under Del. Super. Ct. Civ. R. 60(b)(1). Petitioners averred to the Delaware Supreme Court that the Superior Court's order should be reversed because, *inter alia*, it arbitrarily violated their right to substantive due process under the Fourteenth Amendment of the United States Constitution. The Delaware Supreme Court noted the constitutional argument in its order of affirmance. [2a-3a]. Pursuant to 28 U.S.C. § 1257(a), this Court has jurisdiction to review, by writ of certiorari, the final judgment of the highest court of a state, when the final judgment infringes on rights secured under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners seek review of a decision infringing upon their substantive due process rights secured by the Fourteenth Amendment of the United States Constitution, which provides in relevant part:

> [N]or shall any state deny to any person of life, liberty, or property without due process of law....

U.S. Const., Amend. XIV.

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1. The order of the Delaware Supreme Court is reprinted in the Appendix to this Petition for Writ of Certiorari. Citations to this Appendix are made to the page number therein as "[____a]."

STATEMENT OF THE CASE

1. The Litigation Below

Petitioners in this Court, Anthony J. and Carmella Burkhart, commenced an action for legal malpractice against their former attorney, Louis P. Agostini, Jr., Esquire ("Respondent"), in the Delaware Superior Court, in and for New Castle County, on September 8, 1992, *Burkhart v. Agostini*, Civil Action No. 92-C-09-041. [4a]. The complaint alleged that Respondent was liable for legal malpractice because in January 1991 he had voluntarily dismissed Petitioners' medical malpractice action without obtaining their advice and consent.

On June 28, 1994, Respondent filed a motion to dismiss the action because of Petitioners' alleged failure to obtain medical and legal experts. In response to the motion, Petitioners produced the reports of their legal malpractice expert, Samuel Stretton, Esquire, and their medical malpractice expert, Laurence J. Adams, M.D.

Dr. Adams' report was later amended. In the first three pages of the original report, Dr. Adams reviewed Petitioners' medical history, and set forth his opinion whether Petitioners' medical problems had been caused by the defendants in the original medical malpractice action. Petitioners' counsel later notified Dr. Adams that he neglected to discuss the applicable standard of care, and whether the medical malpractice defendants had breached that standard. Dr. Adams then prepared an amended page four addressing this issue:

> Injury to the femoral artery is a well established complication of threading a catheter through the femoral area into the proximal aorta. Lifting up of the intima or formation of clots follow catheterization of the vessel on occasion. ***The***

arteriographic surgeon breached the standard of care when he failed to warn the patient of this risk.

Revised Report of Dr. Adams, June 13, 1994 (emphasis added). [16a].

Upon receipt of the revision, Petitioners' counsel faxed and mailed a copy to Respondent's counsel.

A hearing was held before the trial court on July 22, 1994 to consider Respondent's motion to dismiss. Before the hearing commenced, Petitioners trial counsel conferred with Respondent's counsel outside the courtroom. During this conversation, Petitioners' counsel learned that Respondent's counsel had not received the amended page four. Petitioners' counsel then called his office to arrange for a copy to be faxed to the trial court's chambers.

After hearing argument by counsel, the Court, relying on the original report of Dr. Adams, held that his report was legally insufficient to establish medical malpractice. The motion to dismiss was therefore granted. The Court acknowledged that it had been apprised of the amended report, but stated that it would not consider it:

The Court: With regard to Dr. Adams, Petitioners' counsel has furnished the Court with an opinion that does not state that any of the defendant physicians breached the, standard of care. ***I understand [Petitioners' counsel's] explanation, that there is a different page four, but I'm not going to act on the basis of a phantom page four, I'm only going to go on what has been presented to me.***

Dr. Adams expresses no opinion whatsoever as to whether the physicians who treated [Petitioner]

> breached any standard of care, and is problematical in his opinion as to causation. He says that [Petitioner's] problem could have been caused by an obstruction of the aorta, that's a long way from saying that it was.
>
> In short, the missing link is still missing in this case, and given the fact that the injury occurred in 1984, and the original lawsuit was filed in 1986, it seems clear that the missing link will never be supplied.
>
> This may be a case where — probably is a case where an injury occurred in the absence of negligence, and that's a shame. But having had eight to 10 years to develop an expert who will say that the doctors, who originally treated [Petitioner] breached a standard of care, and not having found any such person, the Court is going to act on the basis of the opinion that it has been supplied with, and those opinions are insufficient to support a claim of medical malpractice and consequently a claim of legal malpractice. The motion to dismiss will therefore be granted.

July 22, 1994 Hearing. [19a-20a].

Petitioners' counsel then asked the Court for permission to provide the Court with the amended page four:

Petitioners' counsel: Will Your Honor not give me an opportunity to provide you with another page four?

The Court: If there was another page four I would expect you to have it to me here today.

July 22, 1994 Hearing. [20a].

After the trial court announced that it would be dismissing the action, Petitioners' counsel went to chambers to determine if the amended page four had been received. While Petitioners' counsel was out of the court room, the trial court announced:

> The Court: The record should reflect that before the Court ruled fully, [Petitioners' counsel] left the courtroom, presumably to see if he could find the missing page four. Since that time, my secretary has come to the courtroom and supplied me with what I guess is the new page four. I have read that, and I will not alter my opinion at the present time. As I indicated when [Petitioners' counsel] was here, he may make it the subject of a motion for reargument if he wishes.
>
> And I have changed the order to read this way, "This action is dismissed with prejudice against the defendant for plaintiffs' failure to provide the opinions of legal and medical experts that defendant had breached the appropriate standard of care."
>
> The Court will now be in recess.
>
> July 22, 1994 Hearing. [22a].

Although the trial court announced from the bench that it would be granting the motion to dismiss, Petitioners' counsel never received a copy of the order. When Petitioners' counsel learned that the action been dismissed, he filed a motion for relief under Del. Super. Ct. Civ. R. 60(b)(1) on December 8, 1994. The motion averred that the order dismissing the action for failure to produce adequate expert reports should be vacated because the Court only considered the original copy of Dr. Adams' expert report and failed to consider the *amended* page four, which sets forth

the requisite causation language demonstrating that Petitioners' injury was caused by the medical malpractice defendants' negligence. The motion further averred that the Court's failure to consider the amended report resulted from inadvertence and was thus properly subject to a Rule 60(b) motion for relief from judgment.[2]

The trial court heard argument on the motion for relief from judgment on December 22, 1994 and denied the motion. The revised page four would not have changed the outcome of the prior order dismissing the action, the trial judge said, because the revised page four was still legally insufficient to show a *prima facie* case of medical malpractice. Petitioners appealed this order to the Delaware Supreme Court. By order dated October 10, 1995, the Delaware Supreme Court affirmed the Superior Court's order of dismissal.

2. **Preservation of Supreme Court Jurisdiction**

Petitioners argued to the Delaware Supreme Court that the trial court's denial of the motion for reconsideration violated Petitioners' constitutional right to substantive due process under the constitution of the United States because they were denied fair legal process. The Delaware Supreme Court specifically acknowledged the federal constitutional argument in its order of affirmance. [2a-3a]. Petitioners thus preserved federal jurisdiction in accordance with Sup. Ct. R. 14(g)(i).

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2. Del. Sup. Ct. Civ. R. 60(b)(1) is identical to Fed. R. Civ. P. 60(b)(1). *See Burkhart v. Davis*, Del. Supr., 602 A.2d 56, 59 (1991) ("The Superior Court's Civil Rules are patterned upon the Federal Rules of Civil Procedure.") (citation omitted).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE OF GRAVE PUBLIC IMPORTANCE

The Delaware Supreme Court's order affirming the trial court's order denying the motion for relief from judgment has weighty implications for the due process clause of the Fourteenth Amendment of the United States Constitution. By affirming the lower court's order, the Delaware Supreme Court ratified the arbitrary deprivation of Petitioners' constitutionally protected property interest in their action. The *sub silentio* message is that courts may capriciously infringe on citizens' rights without regard to the Fourteenth Amendment. This Court should exercise its discretion to grant the writ, informed by the considerations set forth in Sup. Ct. R. 10(c), to signal the lower courts that trampling upon citizens' constitutionally protected rights will not be tolerated.[3]

The due process clause of the fourteenth amendment provides that no state shall deprive "any person of life, liberty or property without due process of law." U.S. Const., Amend. XIV. This Court has long recognized that the clause provides two kinds of protection when a state attempts to deprive a citizen of life, liberty or property: the guarantee that a person shall have procedural protection, such as notice and a hearing, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); and the guarantee that the laws allowing for deprivation of life, liberty and property are substantively fair. *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986). As this Court recently remarked:

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3. Under Sup. Ct. R. 10(c), one consideration for granting a petition for writ of certiorari is when a state court of last resort "has decided an important question of federal law that has not been, but should be, settled by this Court . . . ."

> Although a literal reading of the [due process] Clause [of the fourteenth amendment] might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, at least since *Mugler* v. *Kansas*, 123 U.S. 623, 660–661 (1887), the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986). As Justice Brandeis (joined by Justice Holmes) observed, "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.

Planned Parenthood v. Casey, 505 U.S. ___, ___ , 112 S. Ct. 2791, 2804 (1992) (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.).

The substantive element of the clause has a twofold interpretation. First, the clause selectively incorporates provisions of the Bill of Rights, and protects these rights from infringement by state and local governments. Second, the clause bars "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels*, 474 U.S. at 331. Thus, the substantive element of the clause "prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' " *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165 (1952)). *See also Taylor Investment v. Upper Darby Township*, 983 F.2d 1285, 1292 (CA3 1993) (substantive due process violation occurs when person is "deprived of a property interest because of either arbitrary and capricious government action or a denial of fair legal process.")

The gravamen of this petition is that the lower courts infringed on Petitioners's constitutionally protected interest in their action by denying their motion for relief from the order of dismissal when Petitioners had satisfied the standard under Del. Sup. Ct. R. 60(b)(1) for obtaining this relief. Petitioners established that the order of dismissal was improvidently granted because the Court failed to consider the revised page four of Petitioners' medical expert. Petitioners established that the court's failure to consider the revised page resulted from inadvertence, within the meaning of Rule 60(b).

But when confronted with the revised page four at the hearing on the motion to open the judgment, Judge Babiarz made a mockery of the substantive due process protection of the Fourteenth Amendment by basing its rejection of the revised page four on a flawed understanding of Delaware malpractice law:

> The Court: I would also add that I considered the additional page back on July 22nd of 1994, and I found that it still is insufficient. The language that I'm sure Mr. Van Loan would point to is the opinion expressed in the very last sentence of Dr. Adams' letter that the arteriographic surgeon breached the standard of care when he failed to warn the patient of this risk. That's basically support for a claim of breach of the informed consent doctrine, which is set forth in 18 Delaware Code, Section 6852 Sub (a). And standing alone, that opinion is plainly insufficient. In order to support such a claim, the plaintiff is obliged not just to establish factually that the doctor failed to warn the patient of a given risk, but that the failure to do so — or that doing so was customary in this community, and that's obviously another matter that is not at all covered in Dr. Adam's

> statement. So even the amended opinion is insufficient and would not have caused me to change my mind, had it been argued in a timely fashion.

December 22, 1994 Transcript. [24a-25a].

Judge Babiarz' basis for denying the motion for relief from judgment — that the revised page four was legally insufficient to establish an informed consent action under the Delaware Code — is patently deficient. To prevail in an informed consent action, Petitioners had to demonstrate that

> (1) The injury alleged involved a non-emergency treatment procedure or surgery;
>
> (2) The injured party proved by a preponderance of evidence that the health care provider did not supply information regarding such treatment, procedure of surgery, to the extent customarily given to patients or other persons authorized to give consent for patients, by other licensed health care providers with similar training and/or experience in the same or similar health care communities as that of the defendant at the time of the treatment, procedure or surgery.

18 Del. C. § 6852(a).

The plain language of the statute contemplates that a doctor will provide a patient with information about a contemplated procedure that is customarily provided by other doctors with similar training and/or experience. Dr. Adams' report stated that *"[t]he arteriographic surgeon breached the*

standard of care when he failed to warn the patient of the risk [of injury to the femoral artery]. [16a]. It is self-evident that Dr. Adams' statement necessarily implied that it would have been customary to warn patients of the risks at the time of treatment. By definition, "standard of care" in a medical malpractice context means the way in which reasonably prudent, similarly situated doctors would have performed a given medical procedure or service. Thus, to say that the "arteriographic surgeon breached the standard of care when he failed to warn the patient of this risk" is simply another way of saying that it was customary for doctors performing arteriogram to warn of the risk of injury to the femoral artery.

Judge Babiarz thus committed flagrant error in denying the motion for relief from judgment when plainly Petitioners had an expert report demonstrating breach of informed consent in accordance with the Delaware statute. This denial had the effect of dismissing Petitioners' action, in which Petitioners hold a constitutionally protected property interest,[4] and denying them substantive due process through arbitrary government action and a denial of fair legal process. *See Taylor,* 983 F.2d at 1292 (substantive due process violation occurs when person is "deprived of a property interest because of either arbitrary and capricious government action or a denial of fair legal process.") Had Judge Babiarz simply followed the cardinal rule of statutory construction that courts

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4. Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Here the state of Delaware statutorily created Petitioners' property interest in their action for breach of informed consent. 18 Del. C. § 6852(a).

must apply the plain language of the statute,[5] he would have had to grant Petitioners' motion for relief. These Petitioners would then have finally obtained their rightful "day in court" to obtain compensation for the horrendous injury they have suffered as a result of Respondent's actions in allowing their medical malpractice action to be dismissed.

It bears emphasizing that Petitioners have attempted for ten years to obtain redress of their grievances through the Delaware courts. They valiantly carried on their legal battle against resources far greater then their own. Though Petitioners sought only a trial before a jury of their peers, the Delaware court system stood in opposition to this constitutionally guaranteed right.

This petition is their last attempt to obtain a trial by jury. If this Court denies this petition, the price paid amounts to many thousands of dollars and ten years of the lives of two people, which price will have been paid in vain. The outrageous actions of Judge Babiarz and the Delaware Supreme Court amount to a constitutional crime against the citizens of the State of Delaware: the theft of their liberty. These Petitioners sound the alarm and call this Court into action as the guardian of freedom.

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5. *See, e.g, Patterson v. Shumate*, 504 U.S. 753 (1992) (party seeking to defeat plain meaning of statute bears an "exceptionally heavy burden"); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) ("The starting point for interpretation of a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); *United States v. Ron Pair Enter. Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.")

CONCLUSION

For the foregoing reasons, Petitioners pray that a writ of certiorari issue to review the judgment and order of the Supreme Court of the State of Delaware entered on October 10, 1995.

Respectfully submitted,

ANTHONY J. AND CARMELLA BURKHART
PRO SE

DATED: January 20, 1996

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY J. BURKHART
CARMELLA L. BURKHART, H/W,

Plaintiffs Below,
Appellants,

v.

LOUIS P. AGOSTINI, JR., ESQUIRE,

Defendant Below,
Appellee.

No. 18, 1995

Court Below: Superior Court of the State of Delaware in and for New Castle County

C.A. No. 92C-09-04194-09833

Submitted: September 12, 1995
Decided: October 10, 1995

Before: **VEASEY**, Chief Justice, **WALSH** and **HOLLAND**, Justices.

ORDER

This 10th Day of October 1995, upon consideration of the briefs of the parties, it appears to the Court that:

(1) Anthony J. Burkhart and Carmella L. Burkhart, plaintiffs below, appeal the denial by the Superior Court of their motion for relief pursuant to Superior Court Rule 60(b) from an order, dated July 222, 1994, dismissing their claim against defendant below, Louis P. Agostini. The plaintiffs did not timely file a motion

for reargument or a notice of appeal. The plaintiffs filed a motion under Rule 60(b) on December 8, 1994, and the Superior Court denied the motion on December 22, 1994.

(2) Superior Court Civil rule 60(b)(1) allows a court, in its discretion, to relieve a part of a judgment because of, *inter alia*, "[m]istake, inadvertence, surprise or excusable neglect; . . ." The Rule should not be used, however, as a substitute for a motion for reargument and an appeal. Dixon v. Delaware Olds, Inc, Del Supr. 405 A.2d 117, 119 (1979).

(3) The Plaintiff sought to use Rule 60(b) as a substitute for an appeal of the dismissal of their claim, and the Superior Court did not abuse its discretion in denying the plaintiffs' motion for relief.

(4) Plaintiffs also argue on appeal that the denial of the Rule 60(b) motion violates their rights to due process under the 14th Amendment to the United States Constitution. Reasonable procedural rules do not interfere with a litigant's due process rights. Logan v. Zimmermann Brush Co., 455 U.S. 422, 437, 102 S.Ct.

1148, 1158 (1982). Rule 60(b) is precisely such a reasonable procedural Rule.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

By the court:

/S

E. Norman Veasey
Chief Justice

SUPERIOR COURT - NEW CASTLE COUNTY
AS Of 03/08/95 PAGE 1

92C-09-041
FILED SEPTEMBER 08,1992
MALPRACTICE
NON ARBITRATION JURY TRIAL

SOLL MELVIN E ANTHONY J. BURKHART
CARMELLA L. BURKHART, H/W
-- VS --
ELZUFON JOHN A. LOUIS P. AGOSTINI, JR., ESQUIRE

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01/21/94	15	#14 PASSED - (REHEARD LATER AT MOTIONS' HOUR AT 12:00 P.M.) ORDER MODIFIED AND SIGNED BY J. SILVERMAN MAS
03/15/94	16	LETTER FROM J. SILVERMAN TO COUNSEL DATED 03/14/94 IN RESPONSE TO DEFTIS REQUEST FOR RECONSIDERATION OF THE COURT'S JAN 21, 1994 LETTER ALLOWING PLTF UNTIL MAY TO LOCATE EXPERTS. DEFT REQUEST THAT THE CUT OFF BE MOVED FORWARD TO MARCH. THE COURT STANDS BY ITS JAN 21, 1994 ORDER. BLB
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07/22/94	19	RE: MOTION To DISMISS DECISION: BABIARZ, J. GRANTED UPON FURNISHING THE COURT WITH MISSING INFORMATION FROM REPORT W/ARGUMENT WAS BASED -DEFTIS ATTY MAY FILE A MOTION FOR REARGUMENT. BLB

07/22/94 20 ORDER SIGNED BY BABIARZ, J. THIS ACTION IS DISMISSED WITH PREJUDICE AGAINST DEFT FOR PLTFS FAILURE TO PROVIDE THAT DEFT @ BREACHED THE APPROPRIATE STANDARD OF CASE. IT *IS SO* ORDERED. BLB

10/05/94 21 LETTER FROM RIDGELY P.J. TO DATED 10/4/94 YOUR LETTER DATED 9/27/94, REQUESTING THAT I "INTERVENE IN YOUR CASE HAS BEEN RECEIVED BY MY OFFICE. A REVIEW OF THE COURT DOCKET INDICATES THAT JUDGE BABIARZ SIGNED AN ORDER ON JULY 22, 1994 DISMISSING THE CASE WITH PREJUDICE. THE PRESIDENT JUDGE DOES NOT REVIEW THE CASE DECISIONS OF OTHER SUPERIOR COURT JUDGES, NOR DOES HE DIRECT THEM HOW ANY INDIVIDUAL CASE SHOULD BE HANDLED. BLB

12/13/94 22 PLTF NOTICE OF MOTION FOR RELIEF FROM ORDER OF 7/22/94 IS VACATED. WILL BE HEARD ON 12/22/94. BLB

12/19/94 23 DEFT OBJECTION TO PLTF MOTION FOR RELIEF FROM ORDER WILL BE HEARD ON 12/22/94. SENT TO ADM ON 12/20. BLB

12/19/94 #23 SIGNED BY BABIARZ, *J. ON* 12/22/94. BLB IT IS HEREBY ORDER THAT PLTF'S MOTION FOR RELIEF FROM AN ORDER DISMISSING THIS CASE AGAINST THE DEFT WITH PREJUDICE ON JULY 22, IS HEREBY DENIED. BLB

01/24/95 24 NOTICE OF APPEAL FROM SUPREME COURT #18,1995 BY THE PLTFS. BELOW-APPELLANTS APPEALING THE ORDER DATED 12/22/95 BEFORE BABIARZ, J. DIRECTIONS TO COURT REPORTER OF PROCEEDINGS BELOW TO BE TRANSCRIBED PURSUANT TO RULE 9(E). CAV

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Certified as a True Copy:
Attest: Sharon Agnew Prothonotary
By : _____ S
Carol Vannurcola

A-9

LAURENCE J. ADAMS, M.D, ASSOCIATES

Laurence J. Adams, MD, J.D.
Diplomate American Board of Neurosurgery (717) 397-1781
822 Marietta Avenue
Lancaster, PA 17603

June 13, 1994

Jonathan A. Van Loan Esquire
288 Lancaster Avenue
Frazer, PA. 19355

Re: Anthony Burkhart v. Agostini

Dear Mr Van Loan:

The issue is whether or not Mr Burkhart's organic impotence is directly related to a femoral injected arteriogram for study of his subclavian artery.

Impotence is an inability to have and maintain an erection and ejaculate. This is not a fertility problem as the sperm may be normal in number and quality.

With erection the vascular channels of the penis fill with blood and become engorged. Obstruction of the blood supply of the penis, Leriche syndrome or its variants; non functioning of the sympathetic nervous system or loss of sensation of the penis from a neurologic lesion are the cause. Neuropathy of the sympathetic nervous system or atherosclerosis of the vessels to the penis from diabetes is a common cause. Mr Burkhart's fasting sugar the one time in the record was 85 (normal)

Fifty percent of impotence is psychogenic. Psychogenic impotence versus organic is determined in the sleep lab. Normal males have an erection during REM sleep-while those with an organic disability do not. A sleep EEG is made and when REM sleep occurs the patient is tested for engorgement of his penis. If he has no engorgement the impotence is organic, if he does have

engorgement the impotence is psychologic. Using this criteria Mr Burkhart's is organic.

Burkhart states that on February 27, 1984, he had an arteriogram performed at the Wilmington Medical Center for a possible thoracic outlet syndrome. He states that since that time he has been impotent.

He injured his neck in 1981. While he was working he had a truck engine on a hand cart and was transferring it from one room to another. He states that he was pulling the handcart towards himself when it was pushed by another worker and at the same time dropped off a depression in the floor. He suffered a flexion-extension injury of his neck at that time. He developed pain almost immediately in his neck.

Following that he had a number of tests. He was treated by Doctor Montaleone in Wilmington. Doctor Davies, a thoracic surgeon, thought he had a thoracic outlet syndrome. Davies ordered two tests. One of these was the femoral injected arteriogram. In the first test they tried to thread some kind of catheter into his brachial vein. "The nurse who was doing this was not able to manage this and the procedure was stopped.

The same day they prepped him for an arteriogram through the femoral root. Doctor Ogelseby did it. Burkhart states that a catheter was placed in his right groin. He could feel it going up through the aorta to his subclavian vessel. When the catheter was in place they told him he was going to feel a hot sensation when they shot the dye. He did. The pain extended up into his neck. He states that they injected him a second or third time and then they pulled the catheter out. He remembers the doctor's hand shaking when he held his fingers over the femoral area to stop the bleeding. After they removed the catheter he felt like there was something still in there.

Next he remembers laying on a stretcher and the arteriographer telling him that things were fine. He never saw Doctor Oglelsby following the procedure. He remembers that he did not get anything to eat while he was in the hospital. He states that following that on the same day his wife wheeled him to the door in a wheelchair and he of hobbled out of the hospital.

When he got home he went directly into the house to urinate. While voiding he passed out and struck his head. Someone called 911 and an ambulance came directly to his home to get him. A paramedic said that he was in shock. He was returned to the hospital and then held 24 hours and discharged.

He was sore in his groin for a couple of months. When he tried to have sex he could not get an erection easily and when he did he lost it. He could feel sex but it was uncomfortable. He says that it feels like the time he slipped out of a girl on the beach and his penis fell into the sand; he now has this feeling all the time. He has diminished sensation in the right groin and the quadriceps area. He has a strange feeling behind his right calf. He did not have sex for two months following the arteriogram.

He got spasms between his shoulder blades six months later. He states that he called the doctor who had done the arteriograin and he laughed at him. He saw an urologist who told him to lose twenty-five pounds and gave a urine sample that normal.

He is not diabetic that he knows of. His back aches across the area where his belt presses. Sometimes this pain radiates down the left leg. At first he dragged his leg when he walked. This is not the case at present. He has lost about fifty pounds since the arteriogram. He has no pain straining. He has muscle spasms in his epigastric area and between his shoulder blades. He has frequency of urination and hesitancy. He has no nocturia. He was mildly constipated at first but not now. He and his wife have no children; this is through choice.

He had low back pain that he had treated by a chiropractor. An MRI of his lumbar spine shows a moderate sized disc herniation centrally and to the right. There is also bulging of the L-4 L-5 disc that fails to compress any nerve roots. He was not operated for the thoracic outlet syndrome. He states that he still has trouble with his neck and arms. He has "weakness" in the supraclavicular area. His hands want to turn in on themselves at times, carpal spasms. He does not admit to hyperventilation. He does not have claw feet. He has neck pain and headache since the accident. He has blurred vision in the right eye at times. He is right handed. He has no trouble with speech.

He has had no operations. He works part time in a liquor store that he owns with his wife. He tries to take a nap in the afternoon because of headaches. For the last fifteen months he wants to be by himself. He doesn't feel like laughing. He's depressed. He was on prozac but is not at present. His psychologic studies are consistent with the admitted depression. Although his mental status might contribute to his impotence or lack of interest in sex, he still failed to get an erection with REM sleep. The impotence is mostly organic.

He is oriented to time, place and person. He is cooperative but very tense. Pupils are equal and react both directly and consentually. Extraocular movement is normal. Fundi are normal.

Fields are full. Corneal reflexes are symmetrical. Facial motion and sensation are intact. Palate and tongue are in the midline. Hearing to whispered voice is normal. There is some resistance to extension of his neck. Blood pressure in the right arm is 120/70 and 140/80 in the left. Pulse is 80 and symmetrical. Adson's test bilaterally is normal. There is no weakness or anesthesia in his upper extremities. The reflex pattern is 1+ and symmetrical. There is no weakness, anesthesia or spasticity in his legs. There are no posterior column signs. The abdominal reflexes are 1+ in all four quadrants. The right knee jerk is absent, the left is 1+. The ankle jerks are absent. Peripheral pulses in his legs are palpable but obviously diminished. Straight leg raising is not limited. Forward bending is not limited.

He has a normal simus rhythm without murmers. There is no adenopathy. Chest is clear to auscultation and percussion. The abdominal wall is tense but there are no masses or organ enlargement.

Mr Burkhart underwent a sleep test to determine the organicity of his failure to obtain an erection. This demonstrated an organic cause for his problem. Obstruction of the small branches of the aortic bifurcation are a well known cause of impotence, the l,eriche syndrome. If we postulate that a small clot came off the arterial catheter or a portion of the intima of the artery was lifted to block the vessels it could very well have obstructed these vessels and resulted in impotence.

We have found no other cause of impotence. He would have had impotence prior to the arteriogram if there was an endocrine abnormality. on examination he has no anesthesia over his peroneum although he states feeling is not good there. The discomfort in his calf could be claudication from vascular insufficiency. He is not diabetic. There is no history of or cause of sympathetic nerve injury in his history.

I believe that the impotence was caused by vascular injury during the arteriogram. It dates from that event. Although he is depressed on testing his impotence is in most part organic.

Very truly yours,

/S
Laurence J. Adams M.D.

cc: Anthony Burkhart
LJA/bad

He has a normal simus rhythm without murmers. There is no adenopathy. Chest is clear to auscultation and percussion. The abdominal wall is tense but there are no masses or organ enlargement.

Mr Burkhart underwent a sleep test to determine the organicity of his failure to obtain an erection. This demonstrated an organic cause for his problem. Obstruction of the small branches of the aortic bifurcation are a well known cause of impotence, the Leriche syndrome. If we postulate that a small clot came off the arterial catheter or a portion of the intima of the artery was lifted to block the vessels it could very well have obstructed these vessels and resulted in impotence.

We have found no other cause of impotence. He would have had impotence prior to the arteriogram if there was an endocrine abnormality. on examination he has no anesthesia over his peroneum although he states feeling is not good there. The discomfort in his calf could be claudication from vascular insufficiency. He is not diabetic. There is no history of or cause of sympathetic nerve injury in his history.

I believe that the impotence was caused by vascular injury during the arteriogram. It dates from that event. Although he is depressed on testing his impotence is in most part organic.

Injury to the femoral artery is a well established complication of threading a catheter through the femoral area into the proximal aorta. Lifting up of the intima or formation of clots follow catheterization of the vessel on occasion. The arteriographic surgeon breached the standard of care when he failed to warn the patient of this risk.

Very truly yours,

/S

Laurence J. Adams M.D.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANTHONY J. BURKHART CARMELLA L. BURKHART, h/w Plaintiffs,	)	Civil Action No. 92C-09-041
v LOUIS P. AGOSTINI, JR., ESQUIRE Defendant.	)	

BEFORE:
HONORABLE JOHN E. BABIARZ, JR., J.

APPEARANCES:

JONATHAN A. VAN LOAN, ESQ.
for the Plaintiffs

ANN D. CAREY, ESQ.
Elzufon Austin & Drexler
for the Defendant

- - - - -

TRANSCRIPT
MOTION TO DISMISS
July 22, 1994

- - - - -

SUPERIOR COURT OFFICIAL REPORTERS
1020 King Street - Wilmington, Delaware 19801
(302) 577-2400 Ext. 411

Superior Court Reporters
Wilmington, Delaware 19801

With regard to Dr. Adams, Mr.. Van Loan has furnished the Court with an opinion that does not state that any of the-defendant physicians breached the standard of care. I understand Mr. VanLoan's explanation, that there is a different page four, but I'm not going to act on the basis of a phantom page four, I'm only going to go on what has been presented to me.

Dr. Adams expresses no opinion whatsoever as to whether the physicians who treated Mr. Burkhart reached any standard of care, and is problematical in his opinion as to causation. He says that Mr. Burkhart's problem could have been caused by an obstruction of the aorta, that's a long way from saying that it was.

In short, the missing link is still missing in this case, and given the fact that the injury occurred in 1984, and the original lawsuit was filed in 1986, it seems clear that the missing link will never be supplied.

This may be a case where -- probably is a case where an injury occurred in the absence of negligence, and that's a shame. But having had eight

to 10 years to develop an, expert who will say that the doctors, who-originally treated Mr. Burkhart breached a standard of care, and, not having found any such person, the Court is going to act on the basis of the opinions that it has been supplied with, and those opinions are insufficient to support a claim of medical malpractice and consequently a claim of legal malpractice. The motion to dismiss will therefore be granted.

Is there an order attached, Ms. Carey?

MR. VAN LOAN: Will Your Honor not give me an opportunity to provide you with another page four?

THE COURT: If there was another page four I would expect you to have it to me here today.

MR. VAN LOAN: It's probably in the Court Administrator's --

THE COURT: It will only be considered on the basis of rearguing the motion.

MS. CAREY: I have a copy of

THE COURT: Well, let me see.

MS. CAREY: *The order is the same one that you have,* Your Honor.

THE COURT: That order will have to be

changed, because the basis of my dismissal was-the sufficiency of the opinions provided, not their existence.

MS. CAREY: I apologize. I overlooked getting a new order.

THE COURT: The record should-reflect that before the Court ruled fully, Mr. Van Loan left the courtroom, presumably to see if he could find the missing page four. Since that time, my secretary has come to the courtroom and supplied me with what I guess is the new page four. I have read that, and I will not alter my opinion at the present time. As I indicated when Mr. VanLoan was here, he may make it the subject of a motion for reargument if he wishes.

And I have changed the order to read this way, "This action is dismissed with prejudice against the defendant for plaintiff's failure to provide the opinions of legal and medical experts that defendant had breached the appropriate standard of care.

The Court will now be in recess.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ANTHONY J. BURKHART	)	
CARMELLA L. BURKHART, h/w	)	
Plaintiffs,	)	Civil Action
	)	No. 92C-09-041
v.	)	
LOUIS P. AGOSTINI, JR.,	)	
ESQUIRE	)	
Defendant.	)	

BEFORE:

HONORABLE JOHN E. BABIARZ, JR., J.

APPEARANCES:

JONATHAN A. VAN LOAN, ESQ.
Attorney for the Plaintiffs

ELZUFON AUSTIN & DREXLER P.A.
By: ANN D. CAREY, ESQ.
Attorney for the Defendant

MOTION FOR RELIEF FROM ORDER
DECEMBER 22, 1994

OFFICIAL COURT REPORTERS
SUPERIOR COURT OF THE STATE OF DELAWARE
DANIEL L. HERRMANN COURTHOUSE, WILMINGTON, DELAWARE

a discipline imposed on myself and would not have bound the defendant in the case or affected the disposition of the Court in this case. And that's also something that is so clear that I don't think it really can be argued about.

So neither of those excuses is sufficient under Rule 60(b) to excuse the failure to file a motion for reargument under Rule 59. And on that basis, the motion is denied.

I would also add that I considered the additional page back on July 22nd of 1994, and I found that it still is insufficient. The language that I'm sure Mr. Van Loan would point to is the opinion expressed in the very last sentence of Dr. Adams' letter that the arteriographic surgeon breached the standard of care when he failed to warn the patient of this risk. That's basically support for a claim of breach of the informed consent doctrine, which is set forth in 18 Delaware Code, Section 6852 Sub (a). And standing alone, that opinion is plainly insufficient. In order to support such a claim, the plaintiff is obliged not just to establish factually that the doctor failed to warn

the patient of a given risk, but that the failure to do so -- or that doing so was customary in this community, and, that's obviously another matter that is not at all covered in Dr. Adam's statement. So even the amended opinion is insufficient and would not have caused me to change my mind, had it been argued in a timely fashion.

The motion for relief is denied. Court's in recess.

(Court recessed at 11:45 a.m. until the call of the Court.)

FILED
APR 24 1996
CLERK

(2)

No. 95-1544

In The

Supreme Court of the United States

October Term, 1995

ANTHONY J. BURKHART, CARMELLA L. BURKHART, H/W,

Petitioners,

vs.

LOUIS P. AGOSTINI, JR., ESQUIRE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware

RESPONDENT'S BRIEF IN OPPOSITION

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45pp

QUESTION PRESENTED FOR REVIEW

Whether the Delaware Superior Court's enforcement of the requirements of Delaware Superior Court Rule 60(b) governing requests for relief from a final order violates Petitioners' rights to due process under the Fourteenth Amendment to the United States Constitution.

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APPENDIX

Appendix A — Transcript of Motion for Relief from Order Dated December 22, 1994 ..... 1a

Appendix B — Transcript of Motion to Dismiss Dated July 22, 1994 ..... 17a

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The courts below have unanimously found that Petitioners failed to meet the standards for obtaining review of a final judgment under Delaware Superior Court Civil Rule 60(b). Petitioners never argued to the courts below that the requirements of Rule 60(b) violate his due process rights. This failure deprives this Court of jurisdiction to consider Petitioners' arguments.

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari because it fails to raise a constitutional issue which was properly argued to the Delaware Supreme Court. The Delaware courts denied Petitioners' motion for relief from dismissal of their legal malpractice claims because Petitioners attempted to use Rule 60(b) as a substitute for a motion for reargument. No proper argument was made to the Delaware Supreme Court that, five months after the order of dismissal was entered, Petitioners could use Rule 60(b) to reargue the merits of its claims. More importantly, no argument was made that a denial of reargument under these circumstances constitutes a due process violation. Appropriately, Petitioners' appeal was dismissed.

Petitioners' application for writ of certiorari to this Court contains the same deficiencies. The application alleges a constitutional violation but fails to recognize that the Delaware courts rejected Petitioners' Rule 60(b) motion on procedural grounds, not on its merits. No argument is made that Petitioners are constitutionally entitled to use a Rule 60(b) motion to reargue the motion which dismissed their claims. Because the procedural grounds for a Rule 60(b) motion remain unaddressed, a review of Petitioners' claims is unwarranted.

A. Course of Proceedings and Disposition of the Case Below

The procedural odyssey leading to Petitioners' application for writ of certiorari to this Court begins with the dismissal order entered by the Delaware Superior Court on July 22, 1994. In response to a motion by Respondent, the Superior Court dismissed Petitioners' Complaint, initially filed on September 8, 1992, in its entirety. The basis for the dismissal was Petitioners' failure to provide an expert opinion that Petitioner Anthony Burkhart had received substandard medical care causing him harm, as required by 18 Del. Code § 6852(a). This expert opinion was necessary to maintain Petitioners' legal malpractice action against Respondent, since as a threshold matter, Petitioners needed to demonstrate that they could have prevailed in the underlying medical malpractice action in which Respondent, an attorney, represented the Petitioners.

At the hearing on Respondent's motion to dismiss on July 22, 1994, Petitioners' counsel acknowledged that the expert opinion on which Petitioners relied was deficient. (Resp. App. 22a-23a). Petitioners' counsel then informed the court that he attempted to provide a revised expert opinion meeting the statutory requirements, but it apparently not been received by Respondent's counsel or the court. *(Id.)*. The court thereupon granted Respondent's motion to dismiss and advised Petitioners' counsel that if an amended report existed, it could be made part of a motion for reargument. (Resp. App. 27a-28a). The court's order was entered on July 22, 1994 at 2:37 p.m. (Resp. App. 3a).

Petitioners did not file a motion for reargument of this decision, nor was it appealed to the Delaware Supreme Court. However, on December 8, 1994, Petitioners presented a motion for relief from the court's July 22, 1994 order. Petitioners' motion did not reference a specific rule entitling it to the relief requested, but merely cited that the July 22, 1994 order "works

a great hardship on the Petitioners." The Superior Court treated this motion as a motion for relief from order under Rule 60(b)(1).[1] (Resp. App. 14a). On December 22, 1994, the Superior Court denied Petitioner's motion for relief from order, stating that Petitioners did not meet the requirements for obtaining reconsideration of the court's prior order of dismissal. The court summarized its ruling as follows:

> [T]he Court has before it a motion under Rule 60(b)(1) for relief of judgment. 60(b)(1) provides that the court may do so —may relieve a party from a judgment where — surprise or excusable neglect. The court has been offered no acceptable reasons for the delay in not presenting a timely motion under Rule 59(e).[2]

(Resp. App. 14a).

In a subsequent comment, the court reiterated the fact that it had not decided Petitioners' claims on the merits but that Petitioners had simply not met the requirements of Rule 60(b)(1) to obtain a review of the order of dismissal:

---

1. Delaware Superior Court Rule 60(b) states: "**(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect . . . "

2. Delaware Superior Court Rule 59(e) states as follows: "**(e) Reargruments.** A motion for reargument shall be served and filed within 5 days after the filing of the Court's opinion or decision . . . The court will determine from the motion and answer whether reargument will be granted. A copy of the motion and answer shall be furnished forthwith by the respective parties serving them to the Judge involved."

> So neither of these excuses is sufficient under Rule 60(b) to excuse the failure to file a motion for reargument under Rule 59. And on that basis, the motion is denied.

(Resp. App. 15a).

Petitioners appealed the Superior Court's denial of its Rule 60(b) motion to the Delaware Supreme Court. After full briefing, the Delaware Supreme Court affirmed the Superior Court's holding that Petitioners could not use Rule 60(b)(1) as a substitute for a motion for reargument or appeal. (Resp. App. 2a). Thus, the only issue subject to review by this Court is whether the Delaware courts' denial of Petitioners efforts to have the July 22, 1994 order reviewed constitutes a due process violation.

B. Correction of Misstatements of the Petition

Pursuant to United States Supreme Court Rule 15.1, Respondent brings the following misstatements or omissions of fact contained in the petition to the Court's attention.

Petitioners state that their counsel filed a motion for relief under Delaware Superior Court Civil Rule 60(b)(1) when it learned that the action had been dismissed. (Petition at 5). Although the court rendered its ruling orally at the July 22, 1994 hearing, Petitioners maintain that they did not receive the order because their counsel had left the courtroom prior to the entry of the order. (Petition at 5). However, the transcript of the hearing indicates that the motion to dismiss was granted with Petitioners' counsel in the room, after which counsel requested the opportunity to provide the court with the amended opinion. (Resp. App. 28a). The court instructed Petitioner's counsel that the amended opinion would only be considered on the basis of

rearguing the motion. (Resp. App. 28a). Thus, Petitioner's counsel was fully informed as to the court's ruling and the procedure for remedying the ruling if Petitioners so desired. Plaintiff's counsel plainly knew of the entry of dismissal, recorded on the Court's docket that same day, as of July 22, 1994.

Moreover, at the December 22, 1994 hearing, Petitioner's counsel acknowledged receiving a hard copy of the order on September 28, 1994. (Resp. App. 4a). Petitioner's counsel took no action for two and a half months until filing the Rule 60(b) motion on December 8, 1994. When asked to explain the delay, Petitioner's counsel stated that they "were unclear . . . how to proceed." (Resp. App. 4a). The significant delay by Petitioner's counsel in filing the Rule 60(b) motion — after hearing the Court's oral ruling dismissing Petitioner's action on July 22, 1994 and receiving an actual copy of the order by September 28, 1994 — was the basis for the Delaware court's denial of Rule 60(b) relief to Petitioners.

Petitioners application for writ of certiorari incorrectly asserts that the Rule 60(b)(1) motion was denied because the Court found that the amended expert opinion "would not have changed the outcome of the prior order dismissing the action." (Petition at 6). As previously noted, the court denied the motion because Petitioners could not demonstrate that their failure to timely file a motion for reargument was due to "excusable neglect" as contemplated by Rule 60(b)(1). (Resp. App. 15a).

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONERS' ARGUMENTS.

This Court refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the state court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, the court will refuse to consider claims that were not raised or addressed below). The Delaware Supreme Court affirmed the Delaware Superior Court's denial of their Motion for Relief from the court's July 22, 1994 Order dismissing their case because Petitioners failed to meet the Requirements of Delaware Superior Court Rule 60(b) for obtaining relief from a final order. (*See* October 10, 1995 Order, Petitioners' Appendix, 1a).

To properly raise a constitutional argument subject to review by this Court, Petitioners needed to argue the following: (1) The Superior Court's finding that Petitioners had not met the requirement of "excusable neglect" under Rule 60(b) was an abuse of discretion, depriving them of due process; or (2) Rule 60(b)'s requirements, which prohibit its use to reargue the merits of a claim, are unreasonable and a violation of Petitioners' due process rights. Neither argument was made. (*See Burkhart v. Agostini*, Del. Supr. Ct. Case No. 18-1995, Amended Brief of Appellants filed April 26, 1995). Petitioners' appeal to the Delaware Supreme Court argued that a dismissal of their claims on the merits would violate their substantive due process rights but never addressed the threshold procedural requirements of Rule 60(b)(1).

The failure to raise due process violations arising from the procedural requirements of Rule 60(b)(1) mandates the denial of Petitioners' writ of certiorari.

II.

THE DELAWARE COURTS' ENFORCEMENT OF REASONABLE PROCEDURAL RULES DOES NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS

Even if Petitioners had made an argument that the procedural denial of its Rule 60(b)(1) motion was a due process violation, that claim should be rejected by this Court. The Delaware Supreme Court held that Rule 60(b) is a reasonable procedural Rule which cannot be used as a substitute for reargument or an appeal. *Dixon v. Delaware Olds, Inc.*, 405 A.2d 117 (Del. Supr. 1979). (Pet. App. 2a). The enforcement of reasonable procedural rules does not interfere with a litigant's due process rights. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S. Ct. 1148, 1158 (1982). As previously noted, Petitioners have not argued that the requirements of Rule 60(b) are not reasonable.

Petitioners contend that they have met the requirements of Rule 60(b) but that the Delaware Supreme Court arbitrarily and capriciously denied them the appropriate relief. A review of the record in light of Rule 60(b)'s requirements shows otherwise. Petitioners' appeal to the Delaware Supreme Court only addressed one of the requirements for Rule 60(b) relief. Given this failure, the Supreme Court had no choice but to affirm the denial of the Rule 60(b) relief. The affirmance in these circumstances does not raise due process concerns.

To obtain Rule 60(b) relief, Petitioners must satisfy a three pronged inquiry. First, they must demonstrate that their failure

to make the proper application was due to "mistake, inadvertence, surprise, or 'excusable neglect' ". *Battaglia v. Wilmington Savings Fund*, 379 A.2d 1132 (Del. Supr. 1977), citing Rule 60(b)(1). Second, they must demonstrate that, if the requested relief were granted, the outcome of the action would be different than if the Order of Dismissal were permitted to stand. *Id.* Third, the court must determine whether the defendant in this case will be "substantially prejudiced" if the motion were granted. *Id.*

In this case, Petitioners' legal malpractice claims were dismissed by Order of the Superior Court dated July 22, 1994. This was effectively a final order. Petitioners thereupon had two avenues for relief from this order: (1) a motion for reargument with the Superior Court to be filed within five days, or (2) an appeal of the Order of Dismissal to the Delaware Supreme Court, to be filed within thirty days. Petitioners did neither. Consequently, on August 21, 1994, Petitioners' remedies were extinguished. Nevertheless, four months later Petitioners filed a Motion for Relief from the Order of Dismissal which was heard on December 22, 1994.

The basis for Petitioners' Rule 60 (b) motion was that the Superior Court had not considered Petitioners' amended expert's report when it dismissed Petitioners' claims on July 22, 1994, and that the amended report satisfied the requirements of 18 Del. Code § 6852(a). The Rule 60(b) motion was denied, however, because it was filed too late. The Superior Court had advised Petitioners' counsel at the July 22, 1994 hearing to make the amended report the subject of a proper motion for reargument. This was not done.

Moreover, while Petitioners' counsel denied knowledge that the Order of dismissal was entered for several months, he acknowledged receipt of the order on September 28, 1994, yet

delayed filing the Rule 60(b) motion for an additional two months. Counsel explained the delay at the Rule 60(b) hearing alternatively by "we were unclear . . . as to how to proceed" and "in October and November, the plaintiffs were seeking redress for their grievances through another channel." (Resp. App. 4a). The Superior Court properly found Petitioners' counsel's excuses for the delay did not constitute "excusable neglect" or "inadvertence" under Rule 60(b), and that the delay in seeking reargument was unreasonable. *See, e.g., Schremp v. Marvel,* 405 A.2d 119 (Del. Supr. 1979) [delay of two months in filing Rule 60(b) motion after discovery of Order dismissal rendered Rule 60(b) motion untimely].

Petitioners' appeal to the Delaware Supreme Court never demonstrated how their conscious delay in seeking reargument of the Order of dismissal qualifies as "excusable neglect" or "inadvertence" under Rule 60(b). In fact, the procedural "excusable neglect" standard was not addressed at all. Consequently, the Supreme Court had no choice but to affirm the denial of Rule 60(b) relief. For the same reasons, Petitioners' petition for writ of certiorari to this Court should be denied.

III.

REGARDLESS OF THEIR PROCEDURAL FAILURES, PETITIONERS HAVE SUFFERED NO DUE PROCESS VIOLATION BECAUSE THEY ARE UNLIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIM.

Delaware law requires that a party seeking relief under Rule 60(b)(1) demonstrate that, if relief was granted, the outcome of the action will be different than if the order was permitted to stand. *Bataglia v. Wilmington Savings Fund Society,* 379 A.2d 1132 (Del. Supr. 1977). The Delaware Superior Court has already noted that the amended expert opinion on which

Petitioners based their Rule 60(b) motion is still insufficient under Delaware law to permit Petitioners to maintain their action. After ruling that Petitioners were not entitled to Rule 60(b) relief at the December 22, 1994 hearing, the court stated:

> So even the amended opinion is insufficient and would not have caused me to change my mind, had it been argued in a timely fashion.

(Resp. App. 15a). This opinion was expressed by the very court to which the case would return if Petitioners' request for relief by this Court were granted. Consequently, Petitioners are not entitled to Rule 60(b)(1) relief under any circumstances, since Petitioners cannot prevail on the merits of their claim.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

JOHN A. ELZUFON
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APPENDIX A — TRANSCRIPT OF MOTION FOR RELIEF FROM ORDER DATED DECEMBER 22, 1994

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

C. A. No. 92C-09-041

ANTHONY J. BURKHART,
CARMELLA L. BURKHART, h/w

Plaintiffs,

v.

LOUIS P. AGOSTINI, JR., ESQUIRE,

Defendant.

BEFORE:

JOHN E. BABIARZ, JR., J.

APPEARANCES:

JONATHAN A. VAN LOAN, ESQ.
Attorney for the Plaintiffs

ELZUFON, AUSTIN & DREXLER, P.A.
By: ANN D. CAREY, ESQ.
Attorney for the Defendant

MOTION FOR RELIEF FROM ORDER
DECEMBER 22, 1994

Appendix A

[2] December 22, 1994
11:15 o'clock a.m.
Courtroom No. 204

PRESENT:

As noted.

THE COURT: Good morning. I apologize for making you late. It started out with a very empty morning with one matter and then rapidly filled up. Mr. Van Loan.

MR. VAN LOAN: Good morning, your Honor. This is plaintiffs' motion for relief from your order dated July 22nd, 1994, under Superior Court Civil Rule 60(b)(1), alleging that the order is based on a mistake of fact and seeking relief therefrom.

As a preface, I would like to request that on the issue of whether the instant motion is timely filed, that your Honor allow counsel to brief that issue before dismissing the motion today, denying the motion today for that basis. In that light, we attempted immediately after the hearing on July 22nd to get a copy of your Honor's order, with full intention to file a motion for reconsideration or seek other relief. We were informed by chambers that the order had not been signed and would not be signed [3] until sometime in August. Thereafter we continued—

THE COURT: Who did you call?

MR. VAN LOAN: In your chambers?

THE COURT: Yes.

MR. VAN LOAN: We spoke with a number of people, a number of ladies in your chambers.

THE COURT: Well, there's only one — well, at that time there were two women who worked for me, my secretary and my law clerk. Other personnel would have been in the court clerk's office, the prothonotary. So that's why I'm asking you to tell me as specifically as you can with whom you spoke.

MR. VAN LOAN: Well, your secretary is one person with whom we spoke, and she will substantiate the substance. What I don't have is a specific date and time and person with whom we spoke in chambers, so I can't represent to you that on certain days at certain times, we made certain telephone calls. Substantively, I am representing to you that we made a rather vigorous attempt to get a copy of the order, and we were not able to do so.

THE COURT: Well, that puzzles me because a copy of my order is in the file on this case with the [4] prothonotary. It bears my signature. I dated it the day I entered it, which was July the 22nd, and it bears the stamp of the prothonotary, the prothonotary's clock-in stamp, which indicates that the order was in the file as of the 22nd. It's clocked in July 22, 1994 at 2:37 p.m. It was in the file.

MR. VAN LOAN: Apparently the prothonotary wouldn't mail us a copy of the order.

THE COURT: Wouldn't mail you a copy?

MR. VAN LOAN: Would not mail us a copy of the order, so we were unable to get a copy of the order. Specifically, we needed

that order to determine exactly why your Honor had dismissed the case. In fact, we did receive a faxed copy of the order from chambers September 28th of this year. Thereafter, in October and November, the plaintiffs were seeking redress for their grievances through another channel, which I know your Honor is — of which I know your Honor is aware. When that channel was resolved against them, we filed the instant motion.

THE COURT: Well, it makes no difference to [5] me about the complaint with the Court on the Judiciary. It obviously had no merit, and the Court on the Judiciary took action sua sponte, so let me set that to one side. But I can't conceive of how an application to the Court on the Judiciary, even if it had merit, would serve to have any impact on this case at all. I mean the maximum that could have happened in that would be some sort of discipline imposed upon myself, not an order that would reverse my order of dismissal in this case.

MR. VAN LOAN: Understood.

THE COURT: Then why wait until it was over with?

MR. VAN LOAN: Because that was the course of action that we elected to take.

THE COURT: Do you have any reason behind it?

MR. VAN LOAN: The reason was, in our judgment, having missed the opportunity to file for reargument, we were unclear, to be perfectly honest, as to how to proceed. Notwithstanding that, in terms of timeliness under the rule, each case is taken on a case by case and fact specific basis. There is no [6] firm standard as to when a motion will be considered timely

filed and at what point it will be considered untimely filed. Here we're talking about a delay from July 22nd of approximately four and a half months.

THE COURT: Specifically, you're talking about a motion for reargument?

MR. VAN LOAN: No, the instant motion, a motion to open the judgment.

THE COURT: Well, your initial remedy would have been to apply for reargument, would it not?

MR. VAN LOAN: That's true.

THE COURT: And that has a five-day time limit on it, if I recollect the rule. I'll take a look at it just to be sure. 59, Reargument: A motion for reargument shall be served and filed within five days of the filing of the Court's opinion or decision.

MR. VAN LOAN: That was our intention. However, we couldn't file the motion for reargument without first seeing the order, so we delayed. I'm just suggesting that on the issue of delay, it's not clear that four and a half months is an unreasonable [7] delay. And if your Honor would deny the motion on that basis, you would be — before you would do that, if you would simply allow us to brief that issue and provide briefs on the issue of whether the motion was in fact untimely filed.

THE COURT: Okay. Go ahead.

MR. VAN LOAN: Now, speaking to the underlying merits of the motion and the underlying merits of the two cases upon

which the motion is based, it's not really correct to say that these litigants have been seeking their day in court since 1992 in the instant case. Actually, they have been seeking their day in court since 1986, when they first filed their case against the doctors and hospital in the underlying medical malpractice action.

The theory of negligence admittedly was not the most straightforward, clear-cut theory of negligence. Therefore, while the plaintiffs had a medical expert at the time they filed their case, there were difficulties in actually presenting a medical expert in that case, and as a result, though they had medical expert testimony, the case was [8] dismissed on summary judgment.

They filed the case against the lawyer, Mr. Agostini, alleging that in agreeing to summary judgment, he had committed a malpractice. As part of that case, of course, the plaintiffs have the burden of proving the underlying medical malpractice case, so they still needed a medical expert. And at all times they were either in contact or working with medical experts to support their theory of medical negligence in the underlying case. However, they experienced the same difficulty in actually getting a medical expert to a deposition. Finally, in the spring of this year, they secured a medical expert who understood their theory of negligence and was willing to testify.

However, understandably, after delay, the defendant in this case filed his motion to dismiss on June 28th of this year. There was a hearing on July 8th of this year which your Honor directed the plaintiffs to provide medical and legal malpractice expert reports to the defendant by July 18th, which the plaintiffs did, after which defendant's counsel renewed her motion to dismiss based on the alleged [9] insufficiency of the medical-legal malpractice reports.

Appendix A

In the hearing that was held on July 22nd, I represented to you, to the Court that there had been a problem with Dr. Adam's medical malpractice report in that the standard of care language was mistakenly not included in the original report, and he had done a second page 4, which we believe we had provided to opposing counsel, but can't prove. At the time of the hearing, I did not have in my possession a copy of the corrected page 4, which had the necessary standard of care language. I attempted to get it during the hearing, but in fact it arrived immediately after your Honor had ruled.

THE COURT: Well, as a matter of fact, as I was beginning to deliver my ruling, you left the courtroom, presumably to see if you could find a copy somewhere, and were gone I think for the entire duration. After you left, my secretary brought in a page — I guess it was page 4, the last page of the opinion that had been faxed up to chambers, and I had it before me, although you weren't present to comment on it. That's my recollection.

[10] MR. VAN LOAN: Understood. The defendant's motion was based merely on the fact that the plaintiffs had not provided at that time a legal malpractice expert's report. I t didn't contain within its purview any allegations about the medical expert report. But the medical expert report was considered at that hearing. Our position was and still is we provided medical and legal malpractice expert reports —

THE COURT: I have no difficulty with the legal opinion. It seems sufficient to me, since it deals with the conduct of an attorney. The difficulty I had when I dismissed it had to do with the medical opinions, just so the record is clear. In my view, the legal opinion that you provided for Mr. Stretton was sufficient to satisfy that prong of your case. The difficulty was with the medical opinion.

MR. VAN LOAN: Even after we provided the second page 4?

THE COURT: Well, I looked at it and I think I commented on it. I'm frankly not sure because that was back in July. But in any event, I [11] know that you did not have an opportunity to comment because you weren't in the courtroom.

MR. VAN LOAN: Well, that medical expert report does say that the defendants breached the applicable standard of care when they failed to inform the plaintiff of the risks attendant to arteriography, and that statement is found in the last paragraph of the expert's report on page 4. Our position was —

THE COURT: Well, that is different from negligence, isn't it, under our medical malpractice statute? That's a different theory, is it not, violation of the informed consent law?

MR. VAN LOAN: That was part of the plaintiffs' original complaint. So our position was those reports should have been sufficient to take us into the next stage of discovery, which would have been depositions. If the defendant at that point had problems with either the qualifications or the real substance of what the expert testimony would be, then of course we would have been prepared to answer a motion to disqualify, et cetera, the experts on something that was more substantial, since we had [12] provided the reports that we were required to provide. So we felt that the case was dismissed improperly for that reason, and we still feel that that is the case.

Now, Rule 60 should be liberally construed. The doubt regarding the errors of fact should be resolved in favor of the petitioner. And where there's substantial rights involved, the

motion should be resolved in favor of the petitioner again. Here our fundamental position is albeit that this case may be classified as one that has been fraught with delay, that the litigants' right or opportunity to simply have the case heard on the merits is what's at stake here, and that's a substantial right. To not have the opportunity even to move forward into the next phase of discovery, to get one legitimate step closer to trial, after all that the parties have attempted to do to make their case, we feel would be unjust, would not be a correct result.

Notwithstanding four and a half months of delay, we're asking the Court to consider the substantial rights of this party, the plaintiff, to have his case heard on the merits, to vacate the [13] judgment of July 22nd, and simply allow the case to move into the next phase of discovery, which would be taking the depositions presumably of our medical and legal malpractice experts. Thank you.

THE COURT: Okay. Miss Carey.

MISS CAREY: Good morning, your Honor.

THE COURT: Good morning.

MISS CAREY: Your Honor, our opposition to this motion for reopening this case is simply based on the fact that it was untimely filed. Your Honor's order was very clear on July 22nd, 1994. Mr. Van Loan was not present during your Honor's order. If he were, he would have heard you comment on the record at the time when you were handed page 4, which was after your Honor had already ordered that he was free to move for reargument. As your Honor pointed out earlier, under Rule 59, motion for reargument should be filed within five days.

Appendix A

Mr. Van Loan's excuse that they were unable to get a copy of your Honor's order is absolutely insufficient and inexcusable. If he had been in the room, he would have known what your Honor's order was. He could have also filed a motion for [14] reargument and noted in there that upon receiving a copy of your Honor's order, it would — the motion would be amended to incorporate that.

If your Honor were to consider this under Rule 60(b)(l), as Mr. Van Loan represents, I guess, first of all, it does not seem to be the proper section applicable to this, but if it were to be under 60(b) at all, it would seem to me it would be under 60(b)(6). In either respect, it is an unreasonable delay.

As Mr. Van Loan said earlier, this case was initially filed in 1986. It was dismissed on motion for summary judgment, as your Honor is well aware, because they could not come up with a medical malpractice expert to address the issues of standard of care and causation. The Supreme Court upheld that, and subsequently, this legal malpractice case was filed. Twice there were judicial orders telling the plaintiff to come up with legal and medical malpractice experts. Both of those orders were breached. The expert reports were not filed in compliance with those orders.

When I filed my motion to dismiss last [15] June, originally last June, one of the bases on which I filed that motion was the fact that the plaintiffs had not complied with two judicial orders requiring them to provide expert testimony. The second hearing on this matter of July 22nd, suddenly there was another page 4 that addressed the standard of care issue, because the malpractice report that had been supplied by Dr. Adams only addressed causation. The second page 4 that supposedly

addressed standard of care was employed after your Honor had already ordered.

And we're back to square one. We keep going around in circles. There comes a point in time, consistent with the Court's holding in Schremp versus Marvel — I believe that's Delaware Supreme, 405 A.2d 119 — there comes a point in time in which the defendants are — should reasonably be expected to have a case concluded. When the Court ordered on July 22nd, after I think we waited 30 days in order to see if there was an appeal forthcoming and there was not, we closed our file. I think there comes a point in time when four and a half, five months, whatever the exact time is, is unreasonable, and it [16] is inexcusable. To say one didn't know how to proceed or to say one didn't file because they didn't have a copy of your Honor's order, it was only five days, and your Honor would have known what he had ordered, as I'm sure you still do.

So the basis of our opposition is simply that this is untimely. The defendant has a right to expect some kind of closure on an issue after a certain point in time.

THE COURT: Mr. Van Loan.

MR. VAN LOAN: Would your Honor allow Mr. Burkhart to speak?

THE COURT: This is not an evidentiary hearing. If there's something he wants to communicate, you ask him and then you can tell me.

MR. VAN LOAN: Judge Babiarz, Mr. Burkhart just asked me to express to the Court that he is living with an injury for

which he has not had the opportunity to seek redress, and second, that he should not be responsible for the errors of his counsel, and that he would ask that the Court allow him to go forward.

With respect finally to the issue of the [17] burden on the defendant, I understand that that is a consideration. However, so far what has that burden been? The first burden was to a different group of defendants. For all intents and purposes, that initial group of defendants is no longer on the line, except in a theoretical sense. So the burden that is on this particular lawyer has only been on his shoulders for about two years. And in that two years, what has the burden really been? Answering the complaint, filing a motion. Considering the fact that that particular lawyer unfortunately experienced a set of circumstances himself that almost removes him from further damage, even in the event of an adverse verdict in this case, the burden actually on the defendant, compared to the burden that the plaintiff has carried, is insignificant in our opinion. We're conscious of it, but in a balancing test, we would ask that the Court weigh it against what this plaintiff has tried to do in order to face a jury of his peers. Thank you.

THE COURT: All right. As counsel know, this Court held a hearing back on July 22nd, 1994 on a motion to dismiss, based on an alleged failure on [18] the part of the plaintiff to come forward with expert opinions supporting his claim of legal malpractice against Louis Agostini, Jr. On that date the plaintiff, by Mr. Van Loan, appeared in court and previously had supplied the Court in a response to Miss Carey's motion with two opinions, one of a Samuel Stretton, Esquire, regarding the standards of legal malpractice. And if my original order is unclear, I hope my statement at the time of the ruling was not unclear. That opinion is sufficient to satisfy the legal malpractice prong of the claim.

Appendix A

The difficulty arose with the medical opinion that was supplied at that time. Under the cases that developed, it was the plaintiffs' obligation to show — to demonstrate that there was some likelihood of success on the legal malpractice claim that he says that Mr. Agostini fouled up. The opinion that was attached to plaintiffs' response and the one that I was supplied with was one of a Dr. Laurence J. Adams, which on its face was insufficient because it simply made no comment whatsoever on any breach of the standard of care.

During argument on that motion, Mr. Van [19] Loan informed me that that — that there was a different fourth page, last page to that opinion, that he didn't have in court and that I didn't have, and I indicated that I couldn't act on the basis of reports that weren't present. I could only act on the basis of the records that I had in front of me. And I went on to rule in favor of the defendant to dismiss the action.

Mr. Van Loan at some point in the proceedings, as I was speaking, and the record of that proceeding will probably show just where, left the courtroom, and I presumed he was going somewhere in the courthouse to see if he could find a copy of the missing fourth page. In any event, while he was gone, my secretary came down from chambers and gave me a copy of the missing fourth page, which I examined. It did not cause me on the face of it to change my mind as to the propriety of a dismissal, and I dismissed the case. And I made the comment at that time that if Mr. Van Loan wished to argue the matter, that it would be subject to a motion for reargument, which I would consider what he might say in support of the opinion of Dr. Adams as revised. [20] That order was entered on July 22nd, taken immediately to the court clerk's office.

Appendix A

Under Superior Court Rule 59(e), it was the obligation of the plaintiff to move for reargument within five days of that ruling, and Rule 6 provides that the time period established in Rule 59(e) is not subject to enlargement. It's a strict time limit. No such motion was filed within five days or in fact even until today.

Rather, the Court has before it a motion under Rule 60(b)(1) for relief from judgment. 60(b)(1) provides that the Court may do so — may relieve a party from a judgment where — on the basis of mistake, inadvertence, surprise or excusable neglect. The Court has been offered no acceptable reasons for the delay in not presenting a timely motion under Rule 59(e).

Mr. Van Loan says first that he couldn't file such a motion unless he had a copy of the order of the Court, and he couldn't obtain it from the clerk's office or from calling any number of court personnel. In fact, the order that was entered that day was signed at the conclusion of the hearing. [21] Again, my recollection is that that was around 2:30 in the afternoon. And it is in the Court's file. It is docket number 20, and bears a clock-in stamp of the prothonotary showing that it was present in the clerk's office at 2:37 p.m., presumably at which time Mr. Van Loan was also still present in the courthouse. I simply can't accept the excuse that that order was not available to Mr. Van Loan.

In addition, Mr. Van Loan makes reference to a proceeding initiated by the plaintiff against myself in the Court on the Judiciary, and that he wanted to await the outcome of that before acting further in this case. That matter was acted on sua sponte by the Court on the Judiciary, dismissed it on its face, as it obviously had no merit, and that recently occurred within the

past two or three weeks. The problem with that excuse is that the disposition that the Court on the Judiciary might have entered would have no impact on this case. Even if the Court had concluded that there was some substantial basis for a complaint against me, a hearing would have taken place, and even if ultimately some sort of judicial discipline were imposed, it would have been [22] a discipline imposed on myself and would not have bound the defendant in the case or affected the disposition of the Court in this case. And that's also something that is so clear that I don't think it really can be argued about.

So neither of those excuses is sufficient under Rule 60(b) to excuse the failure to file a motion for reargument under Rule 59. And on that basis, the motion is denied.

I would also add that I considered the additional page back on July 22nd of 1994, and I found that it still is insufficient. The language that I'm sure Mr. Van Loan would point to is the opinion expressed in the very last sentence of Dr. Adams' letter that the arteriographic surgeon breached the standard of care when he failed to warn the patient of this risk. That's basically support for a claim of breach of the informed consent doctrine, which is set forth in 18 Delaware Code, Section 6852 Sub (a). And standing alone, that opinion is plainly insufficient. In order to support such a claim, the plaintiff is obliged not just to establish factually that the doctor failed to warn [23] the patient of a given risk, but that the failure to do so — or that doing so was customary in this community, and that's obviously another matter that is not at all covered in Dr. Adam's statement. So even the amended opinion is insufficient and would not have caused me to change my mind, had it been argued in a timely fashion.

The motion for relief is denied. Court's in recess.

(Court recessed at 11:45 a.m. until the call of the Court.)

Appendix A

[24] STATE OF DELAWARE:

NEW CASTLE COUNTY:

I, JOHN H. WHITE, JR., Official Court Reporter of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the testimony adduced and proceedings had, as reported by me in the Superior Court of the State of Delaware, in and for New Castle County, in the case therein stated, as the same remains of record in the Office of the Prothonotary, at Wilmington, Delaware, and that I am neither of counsel nor kin to any party or participant in said action nor interested in the outcome thereof.

WITNESS my hand this day of February, 1995.

_____

Official Court Reporter

APPENDIX B — TRANSCRIPT OF MOTION TO DISMISS DATED JULY 22, 1994

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action
No. 92C-09-041

ANTHONY J. BURKHART,
CARMELLA L. BURKHART, h/w

Plaintiffs,

v.

LOUIS P. AGOSTINI, JR., ESQ.

Defendant.

BEFORE:

HONORABLE JOHN E. BABIARZ, J.

APPEARANCES:

Jonathan VanLoan, Esq.
for the Plaintiffs

Ann D. Carey, Esq.
Elzufon Austin & Drexler
for the Defendant

TRANSCRIPT
MOTION TO DISMISS
July 22, 1994

Appendix B

[2] July 22, 1994
2:00 p.m.
Courtroom No. 202

PRESENT:

As noted.

THE COURT: I understood Mr. Burkhart wanted to be here. I can wait.

MR. VAN LOAN: That's right, Your Honor. Unfortunately, Mr. Burkhart isn't feeling well this afternoon and couldn't make it.

MS. CAREY: Your Honor, I want to thank you for taking the time to see us. I came today to renew my motion to dismiss this action.

Your Honor had ordered, on July 8th of '94, that Mr. Burkhart, through his counsel, Mr. VanLoan, supply to me the expert reports on which he intended to rely in this action.

I received a report from Dr. Adams — a report by Dr. Adams from Mr. VanLoan on July 12th. And I received on July 18th, Mr. Stretton's opinion, which apparently is on the legal malpractice. I still [3] think the opinions are insufficient on two issues on Dr. Adams. The report that I received did not address the issue of the standard of care — breaching the standard of care.

If Your Honor looks at Dr. Adams' report of July 13th of '94, the last paragraph, he states that he believes Mr. Burkhart's

impotency was caused by a vascular injury during the arteriogram. Just minutes ago I have been informed by Mr. VanLoan that I have an inaccurate page four, and he is having another page four faxed to us here at the court house that addresses the issue of standard of care. I have not seen it, so therefore I can't address it.

The other issue that I believe Dr. Adams should be disqualified on is that he is not qualified to testify as an expert in this action, there are several reasons for that. Dr. Adams is prepared to testify, supposedly, that there is a breach in the standard of care for a vascular injury. Dr. Adams is a neurosurgeon, not a vascular surgeon. He has no special training in vascular surgery.

I have a deposition of Dr. Adams that was taken on October 11th of 1993 in Krauss versus Medical [4] Center of Delaware. On page three, if Your Honor will, I will hand you up a copy. On page three, line 15, Dr. Adams was asked: "Dr. Adams, have you had any training in vascular neurosurgery?"

Answer, "Yes."

Question, "When was that training?"

Answer, "It was basically between 1953 and 1960."

Question, "Where were you when you had that training?"

Answer, "I was first at Duke University and then at Thomas Jefferson University."

Appendix B

And if you look at Dr. Adams' curriculum vitae, Your Honor, in 1953 through 1960, he was an intern and a resident during that period of time. That does not qualify as any special training in that area. Not only that, it was over 40 years ago. Also, according to his deposition testimony in Weber versus the Medical Center of Delaware, on pages four and 14, he says that he is retired. He is no longer actively practicing neurosurgery. He does state that he maintains an office because of medical malpractice insurance.

[5] It is not clear to me from any of these depositions whether he is actively practicing medicine at all in any form, but at the very least we do know that he is no longer a practicing neurosurgeon.

As Your Honor knows, 18 Del. C, Sec. 6854 requires that a physician must be engaged in the active practice of medicine or surgery for at least the past five years. Since Dr. Adams retired from surgery in '92, that leaves out the surgery. As to medicine, I don't know whether he is a treating practitioner just giving IME's for legal malpractice.

In addition to that, Your Honor, in the case of Good versus Bautista, and I apologize, Your Honor, this is a West Law copy of this case. On page two I have highlighted for Your Honor — and I gave Mr. VanLoan a copy of all of these documents prior to the hearing — I have highlighted a paragraph about midway through page two, "Since an equivalent standard must be required of the expert in the locality where the expert practices, the statutory language clearly implies that only a physician who administers the same kind of medical or surgical treatment about which he proposes to testify will be presumed to be competent [6] to testify

as to the standard applicable to the defendant. A general practitioner who does not perform abdominoplasty is therefore not presumed to be competent to testify on the standard applicable to a specialist in plastic surgery in obtaining a patient's consent to such surgery," end quote.

Down further in that same page, this is a quote, "But a general practitioner is not presumed to be competent to testify on standards applicable to specialists, simply because the general practitioner practices in Delaware or nearby."

So, Your Honor, setting aside the question of the standard of care issue, which to date I still don't have any medical testimony on, I think clearly, given all of those standards, Dr. Adams is not qualified to testify as an expert on this issue of this vascular injury which he claims Mr. Burkhart sustains.

If Your Honor wants me to I can also address Mr. Stretton's opinion, but perhaps maybe Your Honor would like to hear from Mr. VanLoan first.

THE COURT: I would rather hear the whole argument.

[7] MS. CAREY: Mr. Stretton, Your Honor, first of all, his opinion is based entirely on the assumption that Mr. Burkhart would be able to find a medical expert to support the underlying medical malpractice claim. Since at this point in time that is not clear, if there is no medical expert, then this whole opinion falls through.

Furthermore, the allegations on which Mr. Stretton relies, are those that were apparently suggested to him by Mr. VanLoan,

they are on page two of Mr. Stretton's report. He says he did not take adequate steps to locate an expert witness in a medical malpractice matter, and he advised the Court that the plaintiffs had agreed to entry of summary judgment against them, when in fact that was the opposite position of his client.

Your Honor was in fact the judge who originally granted the motion for summary judgment in that case, and if Your Honor looks at this, it is clearly not represented by Mr. Agostini that they wanted — that it was okay to grant the motion for summary judgment. In fact, he indicated, and Mr. Stretton addresses the fact that he indicated — that [8] the lawyer did indicate the client was very upset and did not want to sign or agree to a dismissal. In fact, in that same Burkhart case, Your Honor addressed Mr. Burkhart directly. So I think the premise on which Mr. Stretton addresses is inaccurate, that's the first thing.

And the second thing is, I do not believe there is going to be any expert medical testimony. Mr. Stretton also states that — he says it would be hard pressed to find fault with the attorney. It would be difficult to say the lawyer could be faulted prior to the deposition for not seeking an expert. So Your Honor, I think the entire purpose of Mr. Stretton's opinion goes out the window in the face of the fact that there is no medical expert opinion to date to this point, because we still don't have any testimony from Dr. Adams under the breach of the standard of care.

THE COURT: Mr. VanLoan?

MR. VAN LOAN: Good afternoon, Your Honor. There were two page fours to Dr. Adams' report, I just realized. In fact, my secretary had given me the original page four. When I read Dr. Adams' report, I [9] called him and I said, "It's an excellent

report, but you failed to write anything about the applicable standard of care, and how the physicians in this case breached that standard of care."

So he said, "Oh, pardon me, it was an oversight, I will give you a new page four."

I thought that was the page that I had faxed to Ms. Carey, apparently it was not. And my secretary is supposed to be faxing that page to the courtroom now.

What that page four essentially says, it was a breach of the standard of care for the radiologist not to inform Mr. Burkhart of the risks of arteriography, and he goes into some detail of that. The defendant's motion is a motion to dismiss based on our —

THE COURT: Whose was informed consent, an allegation of the original complaint?

MR. VAN LOAN: Yes. The motion to dismiss is based on our failure — alleged failure to respond to interrogatories, but not providing the names of experts. I admit there was some delay in that, quite a lengthy delay, as a matter of fact. But we also did [10] provide the name of a doctor and the name of a lawyer who would testify in this case.

The motion to dismiss considers only the absence of the name of a legal malpractice expert, not the absence of a medical malpractice expert. But if we are going to consider in this hearing, which I would really object to, based on the fact that neither of these experts has been deposed yet, the qualifications of those experts, I just want to say that the opinions of Dr. Adams as a neurosurgeon, and it's understood that neurosurgeons are

physicians, the only physicians that have to study every branch of medicine. It's the most difficult specialty in which to achieve working ability and board certification, which Dr. Adams is in fact board certified. So the relevance of the fact that he is not a vascular surgeon, I think should be taken up in terms of his qualifications after he is deposed by the defendants.

The fact that Samuel Stretton hinged his opinion on the fact that he assumed that Mr. Agostini did not take steps to find a medical expert, I think is practical in that we ultimately did find the doctor who says, essentially what we believed all along, that [11] arteriography is an extensively evasive procedure, that there are complications occasionally, that Mr. Burkhart was one of a few who suffered the complications, and he should have known about the risks. So Mr. Stretton's opinion otherwise, I think, is extremely good, and his qualifications, or other problems that defendants may or may not have with his report should be taken up once again after he is deposed.

So I would really suggest, Your Honor, that you know, at this juncture, the goal of meeting the defendant's interrogatories was to allow us to get to the next stage of discovery. If they want to come forward in the near future with a motion to disqualify Dr. Adams or Mr. Stretton, then of course we will have to combat that, and we would intend to do so. But at this stage of discovery, I would hope that Your Honor would not dismiss the case when in fact these issues should be flushed out to a greater degree.

THE COURT: Okay. Ms. Carey?

MS. CAREY: Your Honor, I'm getting a little confused about the use of the term knowledge. I think, as Your Honor

knows, a complication of surgery [12] does not mean medical malpractice. And if this page four that comes in refers to a complication of surgery, I still think that that does not address a breach in the standard of care.

As for the lack of informed consent issue, I do not have a copy of the original complaint in the medical malpractice case with me, so I can't address that, Your Honor. I would just renew my application at this late date, coming forward with medical testimony, 10 years after the date of the injury, being ordered twice by the Court, in November of '93 and May of '94, to come forward with these experts, there was no compliance.

Then on July 8th Your Honor told him to have these reports to me by the 18th, and I still, here today, on the 22nd apparently don't have a full report, I think that's one issue. When are we going to say this is entirely too remote from the date of the injury to keep expecting us to keep coming up with a medical expert to support Mr. Burkhart's underlying claim.

In addition to that, Your Honor, I think I renew my application that Dr. Adams is not qualified, [13] there is no point in us going forward and spending more money to find out whether Dr. Adams can come up with something that he is qualified to testify on the matters. I think clearly, according to the rules, he is not qualified.

THE COURT: This case, as we know, arises out of a previous case, a medical malpractice action that was prosecuted by Mr. Agostini, the defendant, against Dr. Davies and some of his associates. Summary judgment was granted to that action by this Court when the plaintiff's expert witness, a Dr. Haines, apparently changed his opinion, otherwise recanted his opinion.

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In any event, at a deposition noticed by the defendant doctors in that action, indicated that the plaintiff did not have the basis for going forward. That event took place shortly before the case was scheduled for trial, maybe a week or less. And on the motion of defense this Court granted summary judgment, because the plaintiff was not in a position to supply an essential element of the medical malpractice action, namely the testimony of the expert which is defendant breached the standard of care. That opinion [14] by this Court was subsequently affirmed by the Supreme Court, and as noted in the papers, and in my recollection, Mr. Agostini did represent to the Court that his client did not agree to dismiss the case, and as a result, the Court held a hearing with Mr. Burkhart present, and spoke directly with Mr. Burkhart, and entered judgment over Mr. Burkhart's opposition. Subsequent to that event, this action was filed against Mr. Agostini alleging legal malpractice, and failing to secure an expert on behalf of the plaintiff.

In order to succeed in that action, the Burkhart's would have had to have demonstrated to this Court and jury that they would have been successful in the malpractice action. They have to demonstrate in this action that there is a medical expert available who would testify that the original doctors, Dr. Davies and Dr. Oglesby, perhaps another physician, admitted malpractice.

Interrogatories were asked to elicit the plaintiff's basis for the claim of malpractice, the identity of the expert witness who was going to support that claim, and no names were forthcoming for [15] a long period of time.

One order compelling answers was signed and breached, and a second order was brought forth earlier this summer asking

this Court to dismiss because of the delinquency. At that point in time Mr. VanLoan represented that he had two partnerships, one from a lawyer, and one from a physician which supported his client's case. I'm not sure whether either one of them had been supplied to the defense, but in any event I ordered that both opinions be supplied to the defense forthwith, and that was done — looks like on July the 8th. That would have been the opinion of Dr. Adams, Laurence Adams, a physician, and Samuel C. Stretton, an attorney.

The attorney's opinion is not particularly important to this Court's decision. Mr. Stretton is obviously a very qualified lawyer, and his opinion states what is obvious, that an attorney has an obligation in taking a medical malpractice to develop an expert witness, if he can't then he has got to tell his client that the case can't be won, it's apparently what Mr. Agostini did. There can't be any quarrel with Mr. Stratton's opinions.

[16] With regard to Dr. Adams, Mr. Van Loan has furnished the Court with an opinion that does not state that any of the defendant physicians breached the standard of care. I understand Mr. VanLoan's explanation, that there is a different page four, but I'm not going to act on the basis of a phantom page four, I'm only going to go on what has been presented to me.

Dr. Adams expresses no opinion whatsoever as to whether the physicians who treated Mr. Burkhart reached any standard of care, and is problematical in his opinion as to causation. He says that Mr. Burkhart's problem could have been caused by an obstruction of the aorta, that's a long way from saying that it was.

In short, the missing link is still missing in this case, and

given the fact that the injury occurred in 1984, and the original lawsuit was filed in 1986, it seems clear that the missing link will never be supplied.

This may be a case where — probably is a case where an injury occurred in the absence of negligence, and that's a shame. But having had eight [17] to 10 years to develop an expert who will say that the doctors who originally treated Mr. Burkhart breached a standard of care, and not having found any such person, the Court is going to act on the basis of the opinions that it has been supplied with, and those opinions are insufficient to support a claim of medical malpractice and consequently a claim of legal malpractice. The motion to dismiss will therefore be granted.

Is there an order attached, Ms. Carey?

MR. VAN LOAN: Will Your Honor not give me an opportunity to provide you with another page four?

THE COURT: If there was another page four I would expect you to have it to me here today.

MR. VAN LOAN: It's probably in the Court Administrator's —

THE COURT: It will only be considered on the basis of rearguing the motion.

MS. CAREY: I have a copy of —

THE COURT: Well, let me see.

MS. CAREY: The order is the same one that you have, Your Honor.

THE COURT: That order will have to be [18] changed, because the basis of my dismissal was the sufficiency of the opinions provided, not their existence.

MS. CAREY: I apologize. I overlooked getting a new order.

THE COURT: The record should reflect that before the Court ruled fully, Mr. Van Loan left the courtroom, presumably to see if he could find the missing page four. Since that time, my secretary has come to the courtroom and supplied me with what I guess is the new page four. I have read that, and I will not alter my opinion at the present time. As I indicated when Mr. VanLoan was here, he may make it the subject of a motion for reargument if he wishes.

And I have changed the order to read this way, "This action is dismissed with prejudice against the defendant for plaintiff's failure to provide the opinions of legal and medical experts that defendant had breached the appropriate standard of care."

The Court will now be in recess.

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[19] STATE OF DELAWARE:

NEW CASTLE COUNTY:

I, Christine E. Mason, RPR and Official Court Reporter of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the proceedings had, as reported by me in the Superior Court of the State of Delaware, in and for New Castle County in the case therein stated, as the same remains of record in the Office of the Prothonotary at Wilmington, Delaware, and that I am neither counsel nor kin to any party or participant in said action nor interested in the outcome thereof.

WITNESS my hand this __ day of _____, 1995.

_____

Christine E. Mason, RPR